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In the Supreme Court
OF THE
United States

October Term, 1965

No. 83

Gertrude Crombie,	*Petitioner,*
vs.	
Helen F. Crombie,	*Respondent.*

REPLY BRIEF OF PETITIONER

I. BASIC PROCEDURE HAS HERE BEEN IGNORED, WITH NO CONFLICT OF EVIDENCE, OR DISPUTE OF LAW INVOLVED.

The common saying, "ignore the problem and maybe it will go away" has certainly been followed by respondent herein. As incredible as this may sound, that has been the unfailing and altogether too successful effort of the plaintiff and respondent throughout all the proceedings in this action, beginning with the original complaint on November 10, 1959. She and her

counsel have done it again in their present Brief in Opposition to this Petition—for Writ of Certiorari—as more fully set forth in the next section herein. This is respondent's last and final hurdle to surmount in order to arrive at a successful conclusion of her six years' opposition by this method to any consideration whatsoever of this one basic issue involved throughout this case.

This issue is the *non-existence of any evidence herein* of the insurance policy, and of any community interest of respondent therein, effective on September 22, 1958—the date of husband's death. It is upon this policy and issue alone that respondent's claim of title to the entire death benefit from said policy is here predicated. The judgment of the California District Court of Appeal likewise closed its eyes to the non-existence of any such evidence. The Supreme Court of California did likewise when it thereafter denied appellant's petition for a hearing before it on said judgment. The present Petition for a Writ of Certiorari herein is directed only to the District Court's decision, as its title discloses. Although petitioner may have improperly included also the Supreme Court's denial of such hearing on this decision, in her argument (on pages 1, 2 and 16, of her Petition), that was done only because the Supreme Court had thereby affirmed as due process this disregard of absence of essential evidence by all three of the California Court's decisions, which in turn were based upon respondent's persistent assumption that this issue did not exist. As incredible as that may appear, such was

the fact, as this Court can readily verify by looking at the only exhibit that purports to bear upon this issue. Due process of law has thus been denied to petitioner.

Respondent, while admitting in her complaint (See Pet. for Cert., bot. p. 6, and top p. 7), that the insurance policy in effect on the date of husband's death, on September 22, 1958, provided that the death benefits were to be paid equally to the two litigants herein, has, in her final brief herein, again ignored the fact that she had *failed to introduce any evidence* at the trial of this action on August 3, 1962, regarding the terms or conditions of said policy, also regarding its relation to any prior policies or contracts relied upon by respondent, and as to any community interest of respondent existing in this policy, and finally as to any explanation as to why the death benefits should not be paid and divided as provided under the terms of said insurance policy in effect on September 22, 1958. The burden of proof was hers to show why the terms of that policy should not be carried out, since she was claiming all of the death benefits under that policy—not under any prior, previously cancelled policies. By confessing in her complaint that this policy, in effect in 1958, provided for equal payment to the two litigants, respondent-plaintiff established a prima facie case against her claim to the *entire death benefits*. The burden was thus further placed upon her to prove how and why the terms of *this policy in effect in 1958* had been legally changed or superceded so as to permit payment of all thereof to the respondent alone.

This policy in effect on September 22, 1958, was not included in plaintiff's Exhibit 7, or in any other exhibit or evidence introduced at said trial. Said Exhibit 7 included only two earlier policies, both cancelled prior to the execution of the policy in effect on the date of husband's death, under which the death benefits were paid. The second of these earlier two policies was an annual term policy, 23 pages in length, that had been executed on July 14, 1953, automatically renewed each year thereafter until admittedly cancelled on March 12, 1956. In this second policy, respondent never had had any community interest therein whatsoever. No community property of hers had ever contributed to the insurance carrier any part of its premiums. She and said husband were never married during the existence of that policy. The first of these two earlier policies, consisting of 37 pages, was executed August 14, 1929, and was also an annual term policy, automatically renewed each year until it was expressly cancelled on July 14, 1953, and superceded by said second policy, executed on that date, which, in turn was cancelled on March 12, 1956. These were the only policies contained in Exhibit 7.

In respect to this earliest policy of 1929, the husband by a separate Property Agreement, dated February 14, 1953, had assigned his *community interest therein with his former wife,* if any, to her (the respondent), and had undertaken to make her the irrevocable beneficiary thereof and to maintain said, then existent, earliest policy in full force and effect in respect to any community property interest that the

two then owned therein. No other policy than these two, contained in this Exhibit 7, were ever introduced into evidence. Consequently, the policy in effect on September 22, 1958, was never introduced into evidence. The date of its execution was never proven nor alleged, and is still totally unknown in this action. Nor were allegations or proof ever presented as to any of its terms or conditions (except allegations as to its beneficiaries in respect to their respective shares). Nor was there any allegation or presentation of evidence before the trial Court as to the relationship of this policy to any of these earlier policies introduced in evidence by Plaintiff's Exhibit 7, nor as to its relationship to said Property Settlement Agreement of February 14, 1953. Nor was any evidence ever introduced to show that respondent ever had any community property interest in said final policy of 1958.

Certainly, the fact that said final policy in effect on September 22, 1958, was given the same number as was formerly given to these earlier cancelled policies, does not in any wise prove or imply an identity of terms and conditions with said earlier, cancelled, and superceded policies. We also know that all three of these policies included only *some* of the same parties. Moreover, we know that said final policy provided that its death benefits were to be divided equally between the two litigants. (See Pet. for Writ of Certiorari herein, on the last 8 lines of p. 6, and first 6 lines of p. 7 thereof.) Unless this latest policy of 1958 existed contemporaneously in whole, or in part, with

these two earlier policies contained in Exhibit 7 (of which fact we have no evidence), it must have been executed at some time after or on March 12, 1956, on which latter date the policy of July 14, 1953 was cancelled. Petitioner was entitled to some evidence at the trial on this very material fact, and the burden of proof was still upon the plaintiff-respondent to produce it.

We also know that the respondent never owned any community property interest in this latest policy, if executed on or after March 12, 1956, for the simple reason that the respondent and her former husband were not married to each other after this date, and that *all* premiums contributed thereto by the husband to said final policy after said date, were necessarily deducted from his earnings which were entirely his community property with petitioner (not with respondent), since he married petitioner on April 13, 1954, long before this final policy was executed, and he remained married to her until his death in 1958. Moreover, said Property Settlement Agreement of February 14, 1953, expressly provided "That any and all property acquired by either Husband or Wife from and after the date hereof shall be the sole and separate property of the one acquiring the same." (See extracts from said agreement contained in Pl. Exh. 1, quoted at the bottom of p. 32 and top of p. 33 of App. Op. Br., filed in Calif. Dist. Ct. of Appeal, and also made a part of the Certified Record on the present Pet. for Writ of Certiorari.) Neither of said earlier, cancelled, insurance policies contained in said

Exhibit 7, had any cash, loan, surrender or continuing value, or power of perpetuity beyond the month, or term for which premiums had been paid thereon in advance by the employer corporation, or beyond the subsequent grace period of 30 days, as provided therein—or beyond the date of their *express cancellations.* (See quoted extracts from Exh. 7, App. Op. Br., pp. 12, 14-17, and 41, and from the Property Settlement Agreement, Pl. Exh. 1, quoted on pp. 30-32 of App. Op. Br. filed in the California District Court of Appeal, also made a part of the Certified Record on the present Petition for Writ of Certiorari.)

Respondent states in her Brief (p. 2): "Significantly, the decision of the District Court of Appeal of California, appended to petitioner's brief, is unassailed on either factual or legal bases by petitioner." Quite to the contrary, that decision has at all times been assailed by petitioner for its total disregard of the absence of any proof of an essential fact in that case, which that Court erroneously assumed had been proven, without evidence. That Court's decision never once mentioned the policy of 1958. We doubt if it even noticed that such policy was not there. Insofar as that Court recited any facts in its decision, they were true. We are not concerned here with the weight of evidence. We are concerned only with the total absence of any such evidence having been presented at the trial, and of the District Court's erroneous, silent assumption that such evidence was presented. That decision, following respondent's lead, completely ignored the total absence at the trial in this action of

any evidence on these issues. A reference to our briefs presented to that Court, as well as our petition before the California Supreme Court herein, which was denied (all made a part of the Certified Record on this pending Petition for Writ of Certiorari), will likewise show how extensively the petitioner called attention to this omission to those Courts, throughout these hearings, and their complete disregard thereof in each of their decisions—as is more fully set forth in the third section hereof.

Although no stenographic report was made of the oral argument before said District Court of Appeals, we do not believe that counsel for respondent will deny that the following remarks were made in substance in said hearing before said District Court: After appellant (petitioner herein) had called the attention of that Court to the failure of any such evidence whatsoever having been introduced at the trial of this action in the San Francisco Superior Court, on August 13, 1962, one of the District Court Justices asked one of the counsel for respondent, substantially as follows: "What do you have to say to that?" Said counsel thereupon replied: "It is preposterous and without merit. We never heard of it before." This was the only answer thereto offered at that time, or in any of respondent's briefs before any of the California Courts as to said absence of evidence. The next section herein will disclose that said counsel had repeatedly heard of it before. As above noted, the District Court's opinion, likewise, was totally silent on said policy of 1958, and referred to no evidence of

community property interest of husband and respondent in said policy in effect on September 22, 1958. Yet, said court likewise had repeatedly heard of it theretofore. Yet, said opinion and Respondent's Brief have never once referred specifically to that policy or ever mentioned any community property interest of respondent therein. (See Appendix to said Pet. for Writ of Certiorari, and said Certified Record herein.)

Plaintiff's whole procedure throughout this case, beginning with her complaint, has crowded out the real issue by starting at the wrong end of the chain of events, and in failing ever to tie this wrong end in with the first link—the policy in effect in 1958. Petitioner claims that this evidence, *if it had ever been introduced,* would never have disclosed any such tie, and that plaintiff would never have dared to attempt to establish any such tie directly or in the correct order. They have relied throughout only upon inferences thereto raised, not by evidence, but by unsubstantiated declarations of counsel. This reverse emphasis has thus far proven very successful for respondent—to the unanticipated surprise and dismay of petitioner, and has thereby denied to her due process of law.

II. RESPONDENT HERE CONTINUES HER ERRONEOUS ASSUMPTION THAT THE POLICY OF 1958 WAS INCLUDED IN HER EXHIBIT 7, IN CONSEQUENCE WHEREOF NO PART OF HER ARGUMENT NOR OF THE DISTRICT COURT'S DECISION REFER TO THAT POLICY.

When respondent, on May 11, 1965, requested this Court for additional time within which to file her

Brief in Opposition to our petition, in order to enable her counsel to examine the available exhibits introduced in the trial Court and on appeal and thus to make her "opposing brief as factual as possible", we assumed that they may have become alarmed by the possibility that the policy in effect in 1958 was in fact not there. If they made any such examination they refrained from disclosing their discovery in their brief, or they shut their eyes to such discovery. There is no such policy contained in Plaintiff's Exhibit 7, which contains only two earlier cancelled policies, and that exhibit is the only best evidence of *any* policies in their own language introduced at the trial. Respondent nevertheless still insists that the policy under which the death benefits were paid, to wit, that in effect on September 22, 1958, *is in evidence* and is contained in this Exhibit 7. That false claim is repeatedly implied in the three pages of her Brief in Opposition directed to this point, as next herein pointed out.

Respondent states (first 4 lines of p. 4, of her said brief): "Petitioner . . . made no objection during the trial to respondent's introduction of . . . the group insurance policy around which the case revolves, Respondent's Exhibit '7'". Again, respondent states (next 4 lines): ". . . petitioner's attorney Sloane admitted in open Court that by doing so, respondent was presenting part of petitioner's own case." This was true, since the two policies alone contained in Exhibit 7 showed that both of them had been cancelled and had nothing to do with the policy in effect

on September 22, 1958. In the center of that p. 4, respondent speaks of the "subject Group Insurance Policy", which should have been the policy in effect in 1958, and not the two cancelled policies in Exhibit 7. This Exhibit includes only these two cancelled policies, and not at all the "subject Group Insurance Policy," of 1958. Again, on the same page 4, respondent stated, "Witness, Walter R. Hayden, ... referring to Respondent's Exhibit '7', . . . testified that, 'There is the contract.'" What contract? Not that in force in 1958, which was not included in Exhibit 7. As Exhibit 7 will show upon examination, it did not refer in any way to the policy in effect in 1958, but only to the two earlier cancelled policies, to the earlier of which the Property Settlement Agreement no doubt alone had some application. No evidence whatsoever was offered at the trial to show any application of that agreement to the policy in effect in 1958. Again, at the top of page 5, of respondent's Brief, she states: "Further, petitioner's counsel, again referring to Respondent's Exhibit '7', . . . admitted in open court during the trial that he had no objection to its introduction in evidence." This was true for the reason that those earlier, cancelled policies were never shown to have any relation to the policy in effect on September 22, 1958.

From the foregoing references it is clear that respondent's counsel are *blindly assuming* that Exhibit 7 included the subject Group Insurance Policy of 1958, under which the death benefits were payable, either because they overlooked the truth that the pol-

icy in effect in 1958 *was not there,* or they deliberately shut their eyes to that fact. Whereupon they conclude, "Thus it conclusively appears from the trial record that petitioner was not thwarted nor otherwise denied due process . . . and her counsel consented to the introduction of all of respondents (9) exhibits."

In order to clear up this apparent confusion in respondent's mind, we believe it can be very simply accomplished by the present Court's examination of said Exhibit 7. In order that this Court could make such an examination at the same time that it studies these briefs, petitioner has heretofore requested the Clerk of your Supreme Court and the Clerk of the trial Court for permission to obtain and file such Exhibit 7 with this Court at this time, but has been advised by your Clerk that his office can "not request the submission of records or exhibits from any lower courts until specifically directed to do so by this court after its initial consideration . . . of a Petition for Writ of Certiorari." However, if counsel for respondent will now so stipulate with counsel for petitioner, that the Clerk of the trial Court should furnish forthwith such exhibit to the Clerk of the Supreme Court of the United States, without awaiting such a request from the Supreme Court, petitioner is advised that such exhibit will be so furnished. This would enable your Court readily to discover the truth of our position forthwith.

Respondent in her brief (pp. 2 and 3) has also argued that petitioner likewise "sought affirmative relief . . . and both offered and had received in evi-

dence proof deemed competent, relevant and material." That would appear to be immaterial to respondent's case, and her obligation to meet her own burden of proof. It was primarily respondent who was seeking to quiet her title to both halves of the death benefit at variance with the designation and division provided therefor under the policy in effect in 1958, as admitted by plaintiff's complaint. If respondent failed to meet this burden of proof, petitioner's affirmative relief was secure. There was no waiver by petitioner at the trial of the requirement that respondent meet her burden of proof by introducing the policy in effect in 1958, and show the application thereto of the Property Settlement Agreement of 1953 by proving that respondent had some community property interest in the policy in effect in 1958.

Respondent makes repeated references to the fact that petitioner, as defendant, introduced only one exhibit or bit of evidence at the trial, to wit, Defendant's Exhibit "A", which disclosed that the insurance company had accepted under an intermediary policy, the husband's "request to make the two parties beneficiaries—fifty-fifty each." (Resp. Br. p. 3.) Even this "one little tag" of evidence, as described by petitioner's counsel, was not necessary to support defendant's affirmative claim if plaintiff failed to meet her burden of proof in support of her own claim.

Neither respondent's brief nor the decision of the California District Court of Appeal made a single reference to the policy in effect on September 22, 1958, nor to the relation of that policy to either of

the cancelled policies contained in and constituting the entirety of Exhibit 7, nor to the question as to any community property interest that respondent may have had in said policy of 1958. Neither respondent's brief herein, nor the decision of said Court, ever once mentioned the words, or any question regarding, any "community property interest of respondent" (or of anybody else for that matter), either as being involved in the policy in effect in 1958 (nor for that matter in either of the cancelled policies contained in Exhibit 7, nor elsewhere).

It seems incredible that respondent could have gone through three state Courts, and have been so successful in each in ignoring these most basic and inevitable issues prerequisite to meeting respondent's required burden of proof, and never have once introduced or referred to a single word of evidence in respect thereto, and that each of these Courts in their decisions, similarly ignored them. That this disregard was not due to any silence of petitioner in respect thereto is shown under our next heading herein.

III. PETITIONER HAS CONTINUOUSLY POINTED OUT TO THE COURTS THIS TOTAL OMISSION OF ESSENTIAL EVIDENCE OF THE DEATH POLICY TO MEET RESPONDENT'S BURDEN OF PROOF.

Perhaps plaintiff (respondent herein) was as oblivious *at the trial* (as was the defendant, the petitioner herein), that Plaintiff's Exhibit 7 *never included the insurance policy* in effect on September 22, 1958, on which the death benefits hereunder were

paid, and which designated both litigants herein as equal beneficiaries thereunder. That Exhibit was introduced by plaintiff as essential to her case. That Exhibit 7 included some 60 pages, and it was only after the trial was over, that petitioner discovered that this exhibit contained only two earlier policies, the second and later of which was "cancelled and superceded" on March 12, 1956, with no evidence to indicate what were the terms and conditions of any possible superceding policy. The policy in effect on September 22, 1958 bore the same number, and, according to the complaint, made the two litigants equal beneficiaries thereof. But we know nothing more regarding its terms and conditions, its date of execution, all of the parties who were bound or affected thereby, or its relation to the prior policies, or how respondent could have retained any community property interest therein. The burden was upon respondent to prove all of these things. Not upon petitioner. It was more natural, therefore, that petitioner should have overlooked the absence of this latest policy in said Exhibit 7, than it was for plaintiff to have done so. If the policy in effect in 1958 had been included, as petitioner had at that time anticipated, she would have never objected to its admission, as she could then have sought to point out from its date, terms and conditions, that the Property Settlement Agreement of 1953 had no possible connection therewith.

Since the points and authorities filed in the trial Court, prior to judgment, were never made part of the record on appeal, the petitioner now has no opportunity to point therein to any of her arguments where

she raised this point. Her first opportunity to raise this point on appeal was in her opening brief before the California District Court of Appeal, filed October 25, 1963. (A copy of that brief is contained in the District Court's Certified Report of the records of its office, now on file in the U. S. Supreme Court Clerk's Office. See pp. 46, 47, 49-54 of that brief.) In that brief, petitioner stated as follows:

> "It is significant that even the second policy (third contract) was *not the policy* under which the insurance company paid into escrow the sum of $16,800 here in controversy. *There has been no evidence of the nature or terms of said final policy introduced herein.*" (p. 51, emphasis ours.)
>
> "The burden was upon respondent to prove the final policy under which the death benefit was paid was *precisely the same policy as that described in and affected by the Property Settlement Agreement.*" (p. 52, emphasis ours.)

Referring to Plaintiff's Exhibit 7, that brief further stated:

> "All remaining five riders . . . . were executed on or prior to May 3, 1954. *We have no evidence . . . of the policy in effect on September 22, 1958, the date of husband's death,* or how it could have been included within the description of the policy referred to in the Property Settlement Agreement of February 14, 1953." (p. 54, emphasis ours.)
>
> [Respondent] "has, throughout the trial, and in her request for a Reporter's Transcript . . . sought to bring into this case extraneous evidence to prove other intentions than those 'ascertained

from the writing alone' and contrary to the 'clear and explicit' language of the documents here involved." (p. 46.)

In the Reply Brief of Appellant (petitioner herein), (pp. 22-25, 31, 32), after the District Court of Appeal had granted respondent's motion, over appellant's opposition, to augment the record on appeal by including Hayden's oral testimony upon which that Court's subsequent decision *wholly relied*, petitioner declared:

> *"respondent's brief makes no mention of any of the terms of the new third policy, rewritten upon the cancellation of the second policy* after its declared cancellation:—'Cancelled Rewritten 3/12/56'. *Nor are the terms of the third policy in effect on September 22, 1958 ever suggested at any point in respondent's brief. . . . The third policy under which payments of death benefits were made was never introduced into evidence and its terms are unknown."* (pp. 24, 25, emphasis ours.)

> "each cancellation and execution of an entirely new policy, created a new, independent and separate contract, with new considerations, new obligations, yes, even new parties with added employers or subsidiaries of the master insured, and even changing employees in numbers, personnel and contributions." (p. 27.)

> "it could have been possible for the Husband to have [so agreed] . . . but he entered into no such agreement. . . . Respondent is trying . . . to insert such a provision into Agreement that was never there." (p. 36.)

In Appellant's Petition for Rehearing in the District Court of Appeal (pp. 7-9, 9-15, 17-20, 22, 23):

> *"Nor did it* [the District Court's Decision] *discuss therein the nature or provisions of the policy in effect when the Husband died. There was no evidence on this policy introduced by plaintiff, upon whom the burden rested."* (p. 10, emphasis ours.)
>
> "the present decision . . . concludes . . . 'The evidence shows that the same policy was in effect from 1929', clearly implying that it remained 'in effect' . . . until the Husband's death, September 22, 1958. . . . *We do not know what policy was then in effect* . . . or whether a new policy had . . . been executed during some subsequent year prior to September 1958. All we know is that the policy of 1953 was marked 'cancelled' on the back thereof." (p. 19, emphasis ours.)

In Appellant's Petition for a Hearing by the Supreme Court it was pointed out that the plaintiff's action was a suit:

> "to quiet title to a half interest in a death benefit of $16,800 paid on account of her divorced husband's death which . . . occurred *on September 22, 1958, under an annual term, employer-employee group life insurance policy,* wherein the divorced husband . . . was one of the insured employees, and wherein . . . the plaintiff herein, had been named jointly with Husband's second wife—the defendant . . . and appellant herein,—as equal beneficiaries, of $8,400 each, plus interest. . . . *These facts do not clearly or fully appear in the District Court's decision, nor the fact that the policy under which said payment was made was*

never introduced into evidence." (pp. 3, 4, emphasis ours.)

"No exhibit, stipulation or evidence was introduced as to the nature or relation of the policy which was in force at the date of death of Husband, under which the benefits were paid." (p. 8.)

In lieu of this one issue, the District Court's decision has discussed only various issues, irrelevant to this death policy, and applicable only to one or both of the two earlier cancelled policies contained in Exhibit 7. Such a false issue was especially raised by the allowance of oral testimony to override the written language of those policies, in the District Court, which testimony was incorporated into the record on appeal under respondent's motion of augmentation before that Court to include the Reporter's Transcript, granted contrary to Rule 5(f) of the California Supreme Court. These irrelevant issues no doubt caused the District Court to lose sight of the one basic issue, i.e., no evidence of the policy in effect on September 22, 1958. The Petition to the California Supreme Court again pointed out:

"No mention of these circumstances was contained in that court's opinion. In fact this aspect of the proceedings came to appellant as a complete surprise, when she received the court's opinion on November 21, 1964, since such augmentation had been denied by the lower court, and the District Court had strongly opposed the same" —(at first, and finally allowed it, conditionally).

"The District Court has, however, transformed this appeal into one involving the question of the

> right of oral testimony in negating the written language of these contracts. It has accomplished this by an unauthorized augmentation of the record on appeal by including therein the Reporter's Transcript, over appellant's objection, and relying upon the oral evidence therein, thereby raising a constitutional question under Section 13 (2nd sentence), Art. I, of the State Constitution, and the Fourteenth Amendment of the Federal Constitution." (p. 3.)

Let it not be said, therefore, that this one issue was never raised before these various state Courts as to the absence of any evidence of the policy in force at the date of husband's death, under which this death benefit was paid, and as to its relation to said Property Settlement Agreement and as to the existence of any *community property interest* assigned thereby in this latest policy.

We shall now turn to these inapplicable issues, which we call "red herring issues", since they have only served to lead these Courts away from the true issue.

IV. RED HERRING ISSUES APPLICABLE ONLY TO CANCELLED POLICIES CREATED A HOAX AS TO THEIR APPLICATION TO UNDISCLOSED TERMS OF THE DEATH POLICY.

All other issues than those applicable to the terms of the policy in force on September 22, 1958,—the death policy—are irrelevant to this entire action. Only such issues have been raised in this action. Outside of the pleadings, no evidence applicable to the death

policy exists in this action. According to the pleadings (see herebelow), the petitioner herein is one of the beneficiaries under the death policy, and since none of the evidence herein applied to that policy, the petitioner's right to her half interest thereunder has never been challenged by any evidence herein. All of the evidence introduced at the trial was directed only to the two cancelled policies contained in Exhibit 7. Not one item of evidence or presumption from evidence has ever been directed to the death policy. Without some such evidence the trial Court had no jurisdiction to award a judgment for plaintiff contrary to the admitted death policy.

The issues raised by means of this evidence actually introduced, which were directed only against those two expired policies, are far more prejudicial to petitioner than merely being irrelevant, incompetent and immaterial and therefore inadmissible. They actually misled each of the California Courts, because of the constant, *untrue, unexpressed assumption* thus implied that Exhibit 7 included the death policy,—*which it did not,* as the Exhibit clearly shows. This evidence and the issues advanced thereon thus served as "red herring", which have lured the Courts off the true trail. They, more than the absence of any evidence of this missing death policy, have created deception and a failure of due process in this action. They have created a hoax in place of the real issue in this case.

In saying this, petitioner and her counsel want it clearly understood that they are convinced that the counsel for respondent-plaintiff have at no time delib-

erately planned or foreseen this development,—any more than did the petitioner-defendant anticipate it. When the counsel for plaintiff may have first discovered that Exhibit 7 did not include the death policy we cannot say. They do not appear to have been aware of it in their last brief in opposition to the present Petition for Certiorari. They certainly had the opportunity to have discovered it before they introduced their Exhibit 7 into evidence at the trial. Their complaint was so vague regarding the terms of the death policy, and approached it in such reverse order, as to have made this oversight easy for all of us to fall into, from the very outset. However, it has now been called to their attention, and to the attention of the Courts so often throughout these appeals, as to leave little excuse for their not having discovered it long ago.

Perhaps they did discover it earlier, but felt the void could be, or was filled by parol evidence regarding this missing link. This would account for their repeated and desperate efforts to introduce at the trial more parol evidence than the trial Court would allow, and for their insistent demands for an augmentation of the record on appeal by an inclusion of the Reporter's Transcript, which defendant had purposely omitted from her appeal as she regarded this contained only incompetent evidence for construing unambiguous written contracts. This desperation of counsel for plaintiff-respondent was effectively voiced in their plea for their motion for an order of the District Court to augment the record on appeal so as to include:

"Reporter's Transcript of the oral proceedings . . . made upon the ground . . . that testimony of the material witness, Walter R. Hayden is necessary."

"that without including . . . said testimony, and all of said transcript, the reviewing court would be denied vital and determinative proof, and that reason and justice require . . . said transcript augment the record on appeal to avert a miscarriage of justice in this action." (App. Pet. for a Hearing by the Supreme Court, p. 10, made a part of the Record on this pending Petition for Certiorari.)

However, Mr. Hayden's testimony was *also directed only to the two cancelled policies* contained in Exhibit 7. Never once did Mr. Hayden refer to the undisclosed death policy. Why? Because the counsel for plaintiff-respondent only directed their questions to Exhibit 7. We must, therefore, conclude that said counsel mistakenly assumed the death policy *was* contained in Exhibit 7. In any event, their innocence produced the unfortunate effect, from petitioner's standpoint, upon the District Court, of causing that Court to believe,—reflected throughout their decision without their saying so, that the death policy was, in fact, in evidence in Exhibit 7. That Court not only thus augmented the record on appeal, but these judges accepted this oral testimony as applicable to the death policy alleged in the complaint, and was their sole basis for assuming that the death policy was in evidence, and that it was the policy referred to in the Property Settlement Agreement which thus extended

the community property interest of the divorced parties to the death policy. From there on, appellant-petitioner appealed only to unhearing ears, and in vain. It doesn't seem possible! But it did so happen. And petitioner, no doubt, contributed to this confusion by his own failure to discard all issues but this one—the non-existence of any evidence pertaining to the death policy, beyond the admissions in regard thereto in the complaint. This failure was caused, in part, because counsel for defendant had himself, at the outset, mistakenly assumed that the death policy was contained in Exhibit 7, and that these "red herring issues" might apply thereto. It had taken months of correspondence and a threat of suit, to get the insurance carrier to make available to the litigants even this incomplete copy of this voluminous Exhibit 7, which we *all* no doubt assumed contained the death policy.

What we have said about the District Court's misconception in its augmentation of the appellate record, and the acceptance of the oral opinion of Mr. Hayden as applicable to and controlling the unknown written terms of the death policy, applies equally to all of the other red-herring issues here raised. Finally, respondent did recognize, in her last brief herein (bottom p. 2), our claim "that respondent not only failed to present the most essential evidence . . . but that such alleged failure was without prior notice or warning to petitioner and without her expectation and to her utter surprise." Nevertheless, respondent here again reverts to her persistent and untenable position, that

our claim is "preposterous", because the "essential evidence"—the death policy—was, in fact, as they imply, already contained in Exhibit 7. Since that is not true, and since respondent's counsel still indicate that they do not know, even now, that it is untrue, may we ask, when and how are we entitled to sound an alarm regarding this hoax, and the misleading, deceptive effect of this untruth and the innocent misrepresentation thus made to the Courts, and our surprise in respect thereto? We have tried to sound that alarm throughout this appeal.

The citation of cases claimed to apply to the cancelled policies likewise are not here shown to be applicable to the death policy, which is not in evidence and whose terms are unknown. (Resp. Br. in Opposition, pp. 6, 7.) Counsel for respondent is wrong when he next asserts (p. 9):

> "In effect, petitioner seeks a review of this California judgment, embracing adequate and independent, State grounds."

As already stated, petitioner seeks this Writ of Certiorari, not because of any dispute as to the facts or as to California law, as applied in the California District Court's decision,—that Court's decision on its face is beyond criticism,—but we seek this writ solely upon the ground that *no evidence whatsoever exists* in this action or was introduced herein, to which the Court can refer in support of the District Court's judgment. If the District Court had realized that there existed no evidence herein as to the terms and date of origin of the death policy to which the Prop-

erty Settlement Agreement and the community interests of the parties under that Agreement could apply, it would have recognized that the trial Court was without jurisdiction to render the decision it did.

V. CONCLUSION

In conclusion, we wish again to point out how the admissions contained in the initial complaint herein regarding the death policy established petitioner's right to a judgment, and how no further allegations in the complaint were supported by any evidence at the trial, showing any connection between the death policy and any possible assignment of any community property interest applicable to the earlier cancelled policies under the Property Settlement Agreement of the parties thereto, since the death policy was never introduced into evidence.

The complaint alleged (Clk's Tr. contained in District Court's Certified Report of records of its office now on file in the U. S. Supreme Court Clerk's office):

> "Plaintiff's former husband, Francis Bernard Crombie, died on September 22, 1958, and . . . the . . . life insurance policy . . . had a value of $16,800 at the time of his death." (Par. III.) (The life insurance policy having a value of $16,800 at death was necessarily the death or "subject policy", which had not previously been mentioned in the complaint.)
>
> "That on July 24, 1959 the plaintiff and defendant, through their respective counsel, prepared and entered into a written agreement

> whereby they stipulated that said $16,800 insurance proceeds be paid . . . to California Pacific Title Insurance Company of San Francisco, as escrow holder, for the account of plaintiff and defendant . . . in a savings account . . . that a true copy of said agreement . . . is annexed hereto, incorporated by reference, as if set forth herein and marked Exhibit 'A'." (Par. V.)

That said Exhibit "A", incorporated in said complaint, provided in part as follows:

> *"the undersigned sole beneficiaries of subject policy* [Helen Faust Crombie and Gertrude Crombie, request] that the $16,800 . . . be paid by check to the joint order of Helen Faust Crombie and . . . her attorney, and Gertrude Crombie and . . . her attorney, . . . subject to said $16,800 being apportioned, divided and paid to said beneficiaries [according as] . . . a court of competent jurisdiction by final Decree, fixes and adjudicates the rights of the respective beneficiaries." (Emphasis ours.)

We respectfully submit (1) that the *total absence of any evidence* as to the terms of the death policy here involved, of any evidence of other documents claimed to be applicable thereto which would change or affect those undisclosed terms, (2) that the disastrous effect of the Court's mistaken assumption that said death policy was included in Exhibit 7, (3) that the Court's order augmenting the record on appeal to include the Reporter's Transcript, contrary to California Supreme Court Rule 5 (f), which transcript made no reference whatsoever to the death policy, and

(4) that the *total absence of any evidence* to show how the assignment of a community interest under an agreement in 1953 in respect to *then existing* and subsequently cancelled policies contained in Exhibit 7, could create a community interest in the later death policy of 1958, have all produced a failure of due process of law which should entitle petitioner to a Writ of Certiorari.

Dated, October 4, 1965.

PAUL E. SLOANE,
Attorney for Petitioner.